

No. 13,082

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

vs.

C. N. GOLDEN,

Appellee.

BRIEF FOR APPELLEE.

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The facts: Appellant seems to have presented the facts accurately.

THE LAW.

Now let us look at the specifications of error upon which Appellant relies:

1. Is the contract between Appellee and the Bankrupt, at the date of the petition in Bankruptcy an "Executory Contract" within the meaning of those words as used by Section 70-b of the Bankruptcy Act?

Appellee cites only one case, i.e., *In re San Francisco Bay Exposition* (1943), 50 F. Supp. 344, to

back his contention the executory contract of Appellee does not come within the purview of Section 70-b of the Bankruptcy Act, which section is quoted in full in Appellant's Brief. The discussion of Hon. Louis E. Goodman in that case centers on a California Statute and not the Bankruptcy Act; his reference to the Bankruptcy Act is a mere comparison by him of two acts and at the most represents an opinion or dictum by him on a point for which he cites no authority and which opinion does not set a precedent as the Bankruptcy Act was not at issue in the case.

The only other authority cited by Appellant was a quotation from 4 Collier on Bankruptcy, page 1228. Once again Appellant is citing the opinion of a man who cites no authority to back his opinion, which opinion is that of a text-book writer.

An examination of 70-b of the Bankruptcy Act shows that it is a mere restatement of the law as it existed before this section was codified. Long before this section was codified the duty of a trustee to adopt or reject a conditional sales contract was recognized by the following authorities:

Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50;

In re Wegman Piano Company, 221 F. 128;

Matter of Ferrell, 246 F. 743;

In re Burgermeister Brewing Co., 84 F. (2d) 388;

In re White Plains Ice Service Inc., 109 F. (2d) 913;

In re Halfety, 136 F. (2d) 640;

Blakely v. Hutchings, 203 N.W. 86;

6 *Am. Jur.* p. 1133.

Appellant rests his entire argument on the proposition a conditional sales contract is not an executory contract within the meaning of Section 70-b of the Bankruptcy Act in that only one party to the contract is obligated to perform, i.e., the Buyer or Bankrupt. Actually the contract in question was more than a conditional sales contract between the parties. It represented that type of executory contract which Appellant claims is the only type covered by said Section 70-b of the Bankruptcy Act. Page 53 of the Transcript of Record sets forth a copy of the alleged conditional Sales Contract, and a close study of this contract reveals duties and obligations resting upon both parties to it.

According to the said contract the buyer was to pay all rent and utility services furnished to said premises, in addition to the payment of the purchase price.

There were many obligations on the part of the Appellee or Seller under this contract. 1. Seller was to arrange a transfer of the lease to Buyer upon completion of the purchase. 2. Seller by implication from the contract was to maintain the lease while Buyer operated the business sold to him and to pay the rent from money received from Buyer; this implication is supported by the testimony of Mr. Golden commencing on line 11 of page 63 of the Transcript of Record continuing over to bottom of page 65. On page 64 is the question by the referee: "Did Mr. Pagliaro, when he would make the payments, did he give you a hundred himself and then would he also give you eighty dollars rent and then you in turn paid

the owner of the property? A. That's right." 3. That Seller maintain all utilities.

There can be no doubt but that the very purpose of Section 70-b of the Bankruptcy Act is to protect such persons as the Appellee:

During the time the trustee did not accept the executory contract and agreement, the entire business remained closed, bills ran up, and customers were lost to other businesses. If the trustee could wait indefinitely to affirm or disaffirm the contract entered into by Mr. Pagliaro, Appellee would have risked and suffered the benefits of a business built up by him and sold to the bankrupt for a small down payment. This then is the equitable reason for Section 70-b of the Bankruptcy Act as it is applied to Appellee.

ARGUMENT II.

A vendor cannot be permitted to shorten the sixty day period by unlawful repossession if Section 70-b applies to this case.

There is the possibility that the acts of Appellee amounted to a technical conversion of the property but at the date the turn-over order was issued by the referee in Bankruptcy, the trustee had not elected to affirm the contract in accordance with 70-b of the Bankruptcy Act. The turn-over order was a very clever method to try to reap the benefits of a contract without shouldering any of its responsibilities as set forth under Argument II above and to avoid the requirements of Section 70-b.

The trustee is not using the turn-over order of the Court to obtain restitution of property, he is trying to obtain money for what he calls a conversion. Such an action for money must be by way of a plenary suit.

If the trustee had obtained repossession of the property by way of proper turn-over order the referee later would have had to reclaim the assets to Appellee on grounds the said Appellant had not fulfilled the obligations of the Executory Contract nor assumed the said contract with its obligations.

ARGUMENT III.

Appellant is entitled to equitable relief for forfeiture under California Law.

The equity of the Bankrupt in the property represented approximately 25% of the total purchase price of the business, and the conditional sales contract expressly allowed the seller to retain all payments made as liquidated damages upon a breach by the buyer. This amount of damages in view of the breach of the purchaser does not in the eyes of Appellee appear to be so unreasonable an amount as to require equitable relief.

In addition more than three months elapsed since the breach by the bankrupt and the election of the seller to sell to another party, which length of time under California Law gives the seller the right to repossess and retain all price instalments paid. (*Goldberg v. List*, 11 C. (2d) 389 at 393; *Liver v. Mills*, 155 Cal. 459.)

That Appellant would be unable to maintain a suit against Appellee for possession or conversion under California Law if no Bankruptcy proceedings had been commenced is clearly shown by the above cases.

Appellant cites one California case to show application of C.C. 3275. The case cited deals with a waiver of a "time is the essence" clause and represents a breach by the buyer for a short time. The leading California case is contrary to Appellant's view. *Glock v. Howard Wilson Colony Co.*, 123 Cal. and *Land-folh v. Cohen*, 89 C.A. (2d) 177, 180.

In conclusion it appears clear to Appellee that Section 70-b of the Bankruptcy Act precludes Appellant recovery in that Appellant has waited more than sixty days in which to act, that Appellant has chosen the wrong remedy to enforce his demand, and no case is set out for application of equity to preclude a forfeiture under California Law.

Dated, Richmond, California,
February 25, 1952.

Respectfully submitted,

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